(14) (12)

Nos. 02-1472 & 03-853

IN THE

Supreme Court of the United States

CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,
Petitioners,

v.

UNITED STATES OF AMERICA; TOMMY THOMPSON, Secretary of the United States Department of Health and Human Services, *et al.*,
Respondents.

TOMMY G. THOMPSON, Secretary of Health and Human Services,
Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth Circuit and for the Federal Circuit

REPLY BRIEF FOR CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES

CARTER G. PHILLIPS
STEPHEN B. KINNAIRD
HOWARD J. STANISLAWSKI
SIDLEY, AUSTIN, BROWN & WOOD, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

LLOYD B. MILLER *
ARTHUR LAZARUS, JR., PC
HARRY R. SACHSE
WILLIAM R. PERRY
MELANIE B. OSBORNE
AARON M. SCHUTT
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street, N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240

* Counsel of Record

Counsel for Cherokee Nation and Shoshone-Paiute Tribes

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The Brief for the Federal Parties is notable not for what it says, but for what the Solicitor General fails to argue. The Solicitor General nowhere contends that the Secretary's conduct was not a plain violation of well-settled appropriations and government contract law, as asserted in the Tribes' Opening Brief ("Tr. Br. _"), as exhaustively demonstrated in the *amicus curiae* brief of the U.S. Chamber of Commerce, *et al.* (CoC), and, most significantly, as found by the Federal Circuit.[1] Instead, the Solicitor General attempts to duck the central issue in this case by arguing that the Tribes' Indian Self-Determination Act "contracts" are not real contracts, for the breach of which there are consequences, but rather mere "government-to-government" arrangements or "programs" which, like intra-agency funding guidelines, the Secretary could disregard at will. As the Solicitor General would have it, the Secretary thus had discretion to fund everything he did other than paying these contracts, including his growing administrative expenses, and only then needed to allocate to the contracts whatever he decided was left. This is a stunning proposition, given that Congress twice amended the ISDA precisely to assure Indian tribes that their contracts would be meaningful and enforceable, and to constrain a defiant agency that was historically underfunding those contracts.

A. The Tribes' Agreements Are Enforceable Contracts.

1. Congress in the 1988 and 1994 ISDA Amendments set out to reinforce tribal self-determination contracting as this Nation's core Indian policy by maximizing the conditions necessary to encourage Tribes to contract with the Secretary. Reacting to the Secretary's historic failure before 1988 to fund those contracts in full, together with his success in arguing that ISDA contractors had no remedies when underpaid,

[1] *See* Tr. Br. 26-37; CoC Br. 5-14, 23-25, discussing *inter alia Mobil Oil Exploration & Producing S.E. Inc. v. United States*, 530 U.S. 604 (2000); *United States v. Winstar Corp.*, 518 U.S. 839 (1996); *Lynch v. United States*, 292 U.S. 571 (1934); *Sutton v. United States* 256 U.S. 575 (1921); *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539 (Ct. Cl. 1980); and *Ferris v. United States*, 27 Ct. Cl. 542 (1892).

Congress mandated the precise terms under which contracts "shall" be funded, 25 U.S.C. 450j-1(a), (g); prohibited any reduction in those contracts save in narrow circumstances, § 450j-1(b); and declared ISDA contractors entitled to "money damages" under the Contract Disputes Act (CDA) if the Secretary continued failing to pay, §§ 450m-1(a), (d). Tr. Br. 8-9; NCAI Br. 16-17, 23; S. Rep. No. 100-274, at 34 (1987). In this way, Congress assured skeptical Tribes that never again would the Secretary have unlimited discretion to underfund their contracts, and to leave Tribes operating the Government's hospitals with neither sufficient resources nor viable remedies. Reassured by these measures, the Tribes here signed Annual Funding Agreements (AFAs) at prices the Secretary agreed to, under terms that could not be clearer that only Congress, *not* the Secretary, would have the power to reduce their contract amounts and thus their Federal hospital operations. In this context it is untenable for the Government now to argue that these Tribes were not awarded effective contracts, that their hospitals should have been closed when the funds the Secretary chose to allocate ran out (or else supported by funds diverted from other tribal activities), and that today they have no remedies.

2. The Government's attempt to ground its counterintuitive argument on various statutory terms has no merit. For instance, the Government's insistence that ISDA contracts are not "procurement" contracts (*e.g.*, US Br. 23-25, citing §§ 450j(a), 450b(f)) is a red herring. In fact, ISDA contracts *began* as procurement contracts. *E.g.*, 41 C.F.R. 3-4.60 (1976); 48 C.F.R. 352.280-4 (1987). When, in the course of streamlining and enhancing the enforceability of these contracts, Congress concluded that the procurement rules only increased contract costs with no corresponding benefit, it "decreas[ed] the volume of contract compliance and reporting requirements" by "eliminat[ing] . . . otherwise applicable federal procurement law and acquisition regulations." S. Rep. No. 100-274, at 19; *see also* NCAI Br. 9, 13, 23. This reform had

absolutely nothing to do with the enforceability of ISDA contracts, much less represent a shift to *un*enforceable contracts.

Similarly ill-considered is the new argument that the ISDA's "limitation of cost" clause (which limits a contractor's responsibility after all "funds awarded under [the] Contract" are spent), somehow reinforces the argument that these are not real contracts. US Br. 24, citing § 450*l*(c)(sec. 1(b)(5). Ironically (given the Government's "procurement" argument), that very clause was modeled on an ISDA procurement clause, 48 C.F.R. 352.280-4(a) (1987) ("Clause No. 3–Limitation of Cost"), and such clauses are a common feature of cost-reimbursable contracting. *E.g.*, 48 C.F.R. 52.232-20. The ISDA clause is designed to protect *the contractor*, not lessen the Secretary's duty to pay the full amount awarded.

The Government's new-found reliance on other ISDA provisions (US Br. 25) fares no better. Far from weakening contractors' rights, Congress extended the Federal Tort Claims Act (FTCA) to tribal contractor employees and made them eligible to access the Federal Supply Schedule (FSS) simply to save money. S. Rep. 100-165, at 112 (1987) (FTCA measure "to ameliorate the high cost of liability and malpractice insurance"); S. Rep. 103-374, at 8 (1994) (FSS measure to reduce "substantially increased . . . cost[s]"). Congress's extension of these cost-saving measures to government contractors is hardly unprecedented, and they neither lessen the contractual nature of the relationship nor magically convert contractors into "an agency" of the Government (US Br. 24).[2]

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[2] *E.g.* 10 U.S.C. 1089(a); 25 U.S.C. 1680c(d); 42 U.S.C. 2212 (all extending FTCA coverage to various private individuals or contractors); GSA Order ADM 4800.2E (Jan. 3, 2000) (listing contractors and other non-federal entities eligible to use the FSS system). *See also Yukon-Kuskokwim Health Corp.*, 341 NLRB No. 139, at 2 (May 28, 2004) (contractor "is not an arm of the Federal Government" and not "in [its] shoes"); *Hu Hu Kam Mem. Hosp.*, 53 FLRA 1200, 1208 (Jan. 28, 1998) (contractors are not "transform[ed]. . . into executive branch agencies"); *Owyhee PHS Indian Hosp. and Elko Clinic*, 53 FLRA 1221 (Jan. 28, 1998) (same); 25 U.S.C. 450k(a)(1), 450*l*(c)(sec. 1(b)(11)) (ISDA contractors

Congress intended all these measures to induce Tribes to shoulder the heavy responsibility for administering Federal health care facilities within their communities by maximizing their contract rights, not to subvert the contracted program by leaving them with no rights once the Secretary cut their funding. Tr. Br. 9; NCAI Br. 15-17. What is decisive here–and what the Secretary ignores–is that Congress spoke time and again of awarding *binding* contracts, *id.* And the law controlling government contracts applies equally to all contracts, be they implied from an exchange of writings (*Winstar*), settlement agreements (*Blackhawk*), leases (*Mobil Oil*), insurance policies (*Lynch*), or ISDA contracts.

3. Much of the Secretary's approach is constructed on the faulty premise that Congress intended Tribes operating ISDA contracts to be on an absolute equal footing with other Tribes.[3] From this the Government argues that the Secretary's generally unreviewable discretion to allocate a lump-sum appropriation to address the needs of other Tribes, *Lincoln v. Vigil*, 508 U.S. 182 (1993), also means the Secretary retained complete discretion to fund or not to fund ISDA contracts. Aside from disregarding the Act, that formulation perversely ends up treating contractors *worse* than non-contracting Tribes, for it forces contracting Tribes to *reduce* hospital services on their reservations to make up for the Secretary's failure to fund their fixed contract support costs

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exempt from agency "nonregulatory requirement[s]," "program guidelines, manuals, or policy directives"). *Cf., United States v. New Mexico*, 455 U.S. 720 (1982) (advance-funded cost-reimburseable contractor that procures on behalf of Government does not stand in its shoes).

[3] Although the Government claims IHS is only trying to treat all tribes "similarly" (US Br. 25), indisputably by its own statistics it is not: Oklahoma Tribes comprise one of the two most *poorly* funded parts of the IHS system (http://www.ihs.gov/NonMedicalPrograms/Inf/), and the Secretary's failure to fund the Shoshone-Paiute's Owyhee Hospital contract led to such severe cutbacks (JA 60) that the Hospital nearly lost its accreditation. Notions of equity did not drive IHS's failure to pay.

(CSCs), while the remainder of IHS's operations remain unaffected.

Plainly Congress *did* prioritize the interests of ISDA contractors, both in the operation of contracted hospitals, and in the protection those contracts (and the Indian people served) would have from excessive agency oversight and unilateral funding reductions. NCAI Br. 13-15. The purpose, of course, was not to elevate some Tribes, but to elevate as this Nation's leading Indian policy the principle of tribal self-determination embodied in the ISDA contracting process. The result is that the Secretary does indeed owe unique responsibilities to ISDA contractors. Far from leaving an ISDA contract the "product of [IHS's] overall allocation mechanism among Tribes" (US Br. 25), the Secretary remains bound by detailed contract funding requirements (§§ 450j-1(a), (b), (g)); must restate those requirements in a Model Contract (§ 450*l*(c)); and faces a "money damages" remedy when he fails to pay (§ 450m-1(a)(1)). In these ways Congress purposefully swept aside earlier rulings that had declared pre-1988 contracts to be unenforceable–the *precise* argument the Government resurrects here. S. Rep. No. 100-274, at 34 (§ 450m-1 overrules *Busby Sch. of the N. Cheyenne Tribe v. United States*, 8 Cl. Ct. 596 (1985)).

4. The Government cannot justify with word-games why, when procurement contractors conduct outsourced functions otherwise furnished by the Government (such as feeding the Nation's troops in Iraq), they are providing services "to" the Government under enforceable contracts, but ISDA contractors operating Government clinics or hospitals do so "as" the Government under unenforceable contracts (US Br. 25); in truth, both are providing services to and for the Government that the Government otherwise would perform itself. And while the Government now argues that an ISDA contractor "does not thereby undertake to supply a fixed quantity of service in exchange for a negotiated price," *id.* 24, plainly that is not so: both contractors here were *required by contract* to op-

erate the Secretary's hospitals and clinics on their reservations for the specified year, and at a specified negotiated price that included CSCs.

Had the Hospital Corporation of America been awarded these same contracts, the Government would never dare argue they were unenforceable at the stated contract price. US Br. 24 (IHS "procurement contractors" do fare better); *but see*, NCAI Br. 11 n.9; S. Rep. No. 100-274, at 13 (criticizing IHS for treating ISDA contractors differently than "private suppliers of goods and services"). Yet here, the Government insists the parties are mere "partners" (US Br. 23), albeit lopsided partners, where the Secretary, alone, chooses how much he will contribute. In the end, it is not the nature of the contract terms, but the identity of the contractor–an Indian Tribe–that is the only remaining distinction supporting the Government's argument. But Indian Tribes are just as entitled to the protection of the law as any other contractor. As the Federal Circuit correctly observed, "[t]here is nothing in the ISDA to support the contention that the Secretary has wider latitude to breach his contracts with the Indian tribes than he has with other government contractors." *Thompson*, Pet. 17a n.5.

B. The Government's Reading of § 450j-1(b) Is At War With The Plain Language and Purpose Of The Act.

The second sentence of § 450j-1(b) provides in pertinent part that "the provision of funds under this [Act] is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this [Act]." The Solicitor General would take these two straightforward limitations on the ISDA's contract funding mandates and transform them into an unspoken congressional grant of power to the Secretary to allocate his mid-1990s lump-sum appropriations in whatever way he saw fit. That astounding proposition finds absolutely no support in the language, structure or history of the Act. Rather, § 450j-1(b) assures that *only* Congress, acting through

annual Appropriations Acts, can alter the Secretary's duty to pay ISDA contracts at the full amounts required by that Act, unless the Secretary clearly demonstrates that doing so is not possible without reducing funding for pre-existing programs serving other Tribes.

The Government offers no support for its claim that the availability clause in the ISDA means something other than what this established term of art means everywhere else in appropriations law: an assurance that the amounts mandated in an authorizing act and identified in a contract are only obligated upon enactment of appropriations legally available to pay those amounts in full. To construe that clause instead as an unprecedented grant of discretion *not* to pay these contractors more than the Secretary chose to budget and spend–even in years when Congress annually increased IHS's available appropriations by up to $88 million (Tr. Br. 11)–is counterintuitive, contrary to appropriations law and unsupported in the statutory text.

Similarly ill-conceived is the Government's interpretation of the condition that, in paying a contractor, "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe." The Government errs in redefining "to reduce funding" to mean, not a reduction from the amounts previously spent, but a reduction from the higher amounts the Secretary each new year chose to budget and spend. And the Government errs in redefining "programs, projects, or activities serving a tribe" to mean not only actual service programs, but also the entire bloated IHS bureaucracy for which the Secretary annually set aside over a quarter billion dollars. JA 525, 542, 562. The Secretary's proposition that his budgeting and spending power at all levels of the agency is sufficient to nullify ISDA contracts is an affront to the plain language and purpose of the Act.

The availability clause. The Government's approach to the availability clause reflects the misconception that Congress reserved to the Secretary the same discretion over fund-

ing matters he would have had under the "lump-sum rule" of *Lincoln* had the ISDA never been enacted. But there is nothing to anchor that remarkable proposition.

Hornbook appropriations law instructs that the "objective of [availability] clauses is compliance with the Antideficiency Act," U.S. General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW at 6-28 (2d ed. 1992); Tr. Br. 26-27; CoC Br. 20-22, so that when an agency signs a contract before an appropriation, it does not create an obligation in excess of amounts legally available out of that later appropriation. 31 U.S.C. 1341(a)(1). As reflected in the *Ferris-Blackhawk* rule, this condition means that contract obligations must be paid *first* out of a legally available lump-sum appropriation, only after which the Secretary retains discretion over how to spend the balance. Tr. Br. 31-32. The Government by omission concedes the Secretary's conduct violated this well-settled law (*supra* 1), and the *only* asserted basis for distinguishing the *Ferris-Blackhawk* rule is patently wrong: an IHS ISDA contractor is in no better position than an IHS procurement contractor to be "charged with knowledge" about the Secretary's daily spending decisions, US Br. 24.

The Secretary nonetheless argues that when Congress used the well-established term of art "subject to the availability of appropriations," it actually meant to include the Secretary's internal "intervening allocation" (US Br. 39). In other words, according to the Secretary, he cannot pay more of a stated contract amount than is legally available, but he can freely pay *less*–even when his appropriations increase $88 million (Tr. Br. 11). The Secretary offers no legal support for the radical proposition that an established term of art ought not to be given its ordinary meaning, but instead be read in light of the agency's choices about how to use its appropriation.

Nor can the phrase "provision of funds" reasonably be stretched as far as the Government would take it (US Br. 41). That phrase simply addresses the "expenditure" of funds, 31 U.S.C. 1341(a)(1)(A)–literally, the payment of money–not

some unprecedented "grant of authority to the Secretary to adjust funding levels" (US Br. 41). Congress and agencies routinely use the "availability" clause as a limit on a duty to pay found elsewhere in an authorizing act,[4] not as a grant of discretion *not* to pay. "[F]amiliar statutory language" should not be given "a meaning foreign to every other context in which it is used." *Jones v. R.R. Donnelley & Sons Co.*, 124 S.Ct. 1836, 1845 (2004).[5]

The Secretary's reading of the availability clause is diametrically opposed to the constraints in Secretarial discretion Congress imposed in the Amendments, and is foreclosed by the mandate that the Act's provisions "shall be liberally construed for the benefit of the Contractor." § 450*l*(c)(sec. 1(a)(2)). For the same reason, the Government reads too much into Congress's repetition of the availability clause in the 2000 Amendments (US Br. 43): if Congress is presumed to have approved anything, surely it would be the universal decisions at that point *rejecting* the Secretary's position in the context of lump-sum appropriations (Tr. Br. 17-18, citing cases). *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) ("well-settled presumption that Congress understands the state of existing law when it legislates").[6]

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[4] *E.g.*, 15 U.S.C. 636(m)(7)(B)(i); 16 U.S.C. 5608(b); 20 U.S.C. 4357(b)(2); 25 U.S.C. 640d-27(a); 29 U.S.C. 1907(b)(2); 29 U.S.C. 3012(b)(3)(B); 42 U.S.C. 13921(a)(3); 46 U.S.C. 53106(a)(1); 48 C.F.R. 52.232-18; *infra*, 1a-2a.

[5] The Secretary's misconstruction would override the ISDA's funding mandates, §§ 450j-1(a), (g), the anti-reduction prohibitions, § 450j-1(b), and even the reduction clause, for it would make no sense for Congress to command payments, prohibit reductions, and specially address programs serving other Tribes if it intended all along to grant the Secretary complete discretion whether to pay. (The hypothetical bind from a *reduced* appropriation (US Br. 39) is easily answered by uncited § 450j-1(b)(2)(A), authorizing contract reductions when appropriations fall.)

[6] Respecting the plain meaning of the 1988 availability clause does not produce redundancy with a different 1975 "availability" clause (US Br. 40-41). The latter clause (§ 450j(c)) is directed to the future years of the unique *multi-year* contracts authorized in § 450j(c) (not the *annual* con-

The Government's search into legislative history to support its broad interpretation of this clause is similarly unavailing, for the availability clause has *no* legislative history. This routine term of art was added by the bill's floor manager Representative Udall immediately prior to passage, accompanied by an explanation of the bill's "more important changes" that made no mention of the clause. 134 Cong. Rec. 23340 (1988). Surely "an amendment which would work such an alteration to the basic thrust of the draft bill . . . would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill," *Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 17-18 (1987); *see also Train v. City of New York*, 420 U.S. 35, 45-46 (1975) (rejecting theory Congress "at the last minute scuttled the entire effort"). The Government's effort (US Br. 42) to infer "apparent" congressional intent from a BIA letter offering no explanation (along with more remote writings) only underscores the danger of searching the "entrails of legislative history" for whatever support one's theory might find. *Int'l Union v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984).[7]

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tracts involved here). It reflects the time-honored rule of *Bradley v. United States*, 98 U.S. 104 (1878), and *Leiter v. United States*, 271 U.S. 204 (1926), that absent a special statutory right, the 'out' years of multi-year contracts do not create contract obligations. H.R. Rep. No. 93-1600, at 29 (1974) (explaining need for clause); *cf.*, 48 C.F.R. 32.705-1(b).

Nor is the Secretary's expansive view of the availability clause supported by the "deficiency in funds" component of the Act's mandatory Secretarial reports (US Br. 42, citing § 450j-1(c)(2)), reports, incidentally, the Secretary never made (NCAI Br. 27). This provision reflects the possibility that later Congresses might cap CSCs in future Appropriations Acts, and Congress wanted to know of any resulting shortfalls. There is nothing inconsistent between Congress's desire to track all aspects of contract funding, including shortfalls in cap years, and its judgment that the Secretary's duty to pay is fixed by the legal availability of appropriations.

[7] The Secretary's brief also mangles other principles of appropriations law. The Secretary disregards Congress's selective use elsewhere (but not in these cases) of the term of art "not to exceed" (US Br. 45), casting aside the principle that Congress is presumed to mean what it actually says, Tr. Br. 26. Similarly, the Secretary (1) mislabels a committee recommenda-

The reduction clause. Section 450j-1(b) also directs that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this [Act]." The plain meaning of this provision is that the Secretary could, but did not have to, reallocate spending from one Tribe to another. Tr. Br. 45. From this limited exception to reprogramming, and in order to protect his bureaucracy, the Secretary reaches the broad conclusion that the ISDA left *no* appropriations available to pay the Tribes. The Government reaches this unconvincing position by arguing that (1) funding for inherent (*i.e.*, noncontractable) federal functions cannot be reprogrammed to pay ISDA contract costs (including CSCs) and (2) funding for contractable administrative functions cannot be reprogrammed either, because those are "programs, projects, or activities serving a tribe." US Br. 28-29. Its arguments have no basis in the Act and are belied by the facts.

The Government is correct that inherent federal functions by definition cannot be contracted to the Tribes, but that is not at issue here. Never have the Tribes sought to contract the administration of the Secretary's "inherent federal functions," and nothing in the Federal Circuit's decision suggests they could. By definition, the reprogramming action man-

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tion as an "earmark" (US Br. 11); (2) omits the words "transitional" and "shall *remain* available" to alter the meaning of the "ISD Fund" (*id.* 42-43); (3) creates a new presumption that Congress knows what an agency is doing (*id.* 43 n.17); and (4) disregards the term "initial or expanded" in the ISD Fund. This last error permits the Secretary to recharacterize the Cherokee Nation's FY1996 "ongoing" CSC underpayment as an initial underpayment (*id.* 15 n.9), even though the Stilwell and Sallisaw portions of that AFA had been initially contracted 2 to 4 years earlier (Tr. Br. 14). Likewise, the Shoshone-Paiute FY1997 AFA underpayment was for an "ongoing" activity first awarded as an initial AFA in FY1996, *id.* 16. *See, e.g.*, 68 Fed. Reg. 37511 (Jun. 24, 2003); 62 Fed. Reg. 1468 (Jan. 10, 1997) (explaining "ongoing"). Throughout, the Secretary simply ignores his own concessions elsewhere that the plain effect of the ISD Fund was to give the agency flexibility to fund transitional costs in the following year, not to cut off funds due and payable in the current year, Tr. Br. 37.

dated by established federal contract law (Tr. Br. 31-32) is not an assignment of a function to the contractor, but a reprogramming of money away from something the agency is doing and will continue to do (albeit with a little less money). Nothing in the ISDA bars reprogramming funding for those functions in order to meet the Secretary's contract obligations; just because a function is not contractable does not mean the amount of spending on it, which is wholly within the Secretary's discretion, is necessary or efficient or can never be reduced.

The text of the ISDA's anti-reduction provisions proves the point. Sections 450j-1(b)(1), (3) & (4) prohibit the Secretary from reducing contract amounts to pay for various "Federal functions" like "administration by the Secretary" and "contract monitoring." As a matter of plain language, this categorical requirement prohibits the Secretary from sacrificing ISDA contract obligations in favor of spending on "Federal functions," with no exception for federal functions that are inherent. Indeed, these sections twice declare that funding for "contract monitoring"–which the Government insists is an inherent function (US Br. 34)–"shall not" take precedence over funding an ISDA contract. Plainly these measures *do* "appl[y] to funds retained by the Secretary to pay for inherent federal functions," *id.*, and the Government's attempt to wriggle free from this provision misstates the Act. The Government claims that subsection (b)'s protection for "[t]he amount of funds required by subsection (a)" covers "only 'those administrative functions that are *otherwise contractable*,'" (*id.*, quoting subpar. (a)(1)), but not CSCs. That is demonstrably wrong: by its terms subsection (b) protects all "subsection (a)" contract amounts, including the CSCs required by subpar. (a)(2). Thus, *nothing* in subsection (b) says spending on "Federal functions" as a whole (contractable or not) cannot be reduced to pay contract obligations, be they CSCs or the Secretarial amount.

With no textual support, the Government is left arguing that § 450j-1(b) must not be read to "strip IHS of the ability to perform those functions[ ] which are critical to the existence and integrity of the very contracting process the Tribes have invoked," *id.* 35, or further, to jeopardize the very existence of the IHS, *id.* 19. This is hyperbole. This provision simply limits the power of the Secretary to engage in discretionary spending on his bureaucracy at the expense of the Tribes. Indeed, in FY1994-96 the Secretary boosted his total Headquarters and Area Office spending on inherent federal functions (his so-called "residual") by 41% from $25.6 to $36 million, more than enough to pay the CSCs at issue here.[8] JA 525, 542, 562. The impression the Government gives that spending on inherent federal functions was fixed and irreducible is thus untrue, and the Secretary does not even attempt to show why, in order to meet his contract obligations here, he could not have forgone a fraction of the $10.4 million increase he chose to make.

The Secretary's specter of ISDA contract payments absorbing the entire IHS budget is speculative, to say the least. Although dealing a blow to IHS's other spending would not demonstrate a flaw in the ISDA (Tr. Br. 46-47), certainly no such issue arose in FY1994-97, when Congress annually boosted IHS appropriations by up to $88 million and the agency ended each year with up to $98 million in unspent balances. *Id.* 11-12. Even if the Secretary *had* determined that funding for his inherent functions could not be reduced, his total budgeted spending on federal functions as a whole

[8] The Government never mentions the relatively small annual underpayments at issue here (between one and two million dollars as compared to the Secretary's one-quarter billion administration), electing to feature only total underpayments to all contractors. But this is not a class action, as the district court in *Cherokee* made plain in a ruling that makes future class actions problematic (199 F.R.D. 357). It is a direct action by only two contractors, continuing years after the limitations period has expired for similar claims by other Tribes and long after Congress has foreclosed later claims by capping the annual appropriations. Tr. Br. 12.

(contractable or not) was *over a quarter billion dollars*. The idea that he could not reprogram a tiny fraction of this bureaucracy to pay his contract obligations to the Tribes without impairing critical "inherent" functions is ludicrous.

The Government seeks to immunize the Secretary's discretionary spending of IHS's available quarter-billion dollar appropriation by another interpretive sleight of hand: the misuse of "tribal shares." It insists that everything the Secretary allocated for spending on federal functions that were *not* "inherent" was for "programs, projects, or activities serving a tribe" that need not be reduced. This interpretation is wrong on multiple counts. First, it is contrary to the plain wording of the reduction clause, which only protects the level of funding for ongoing programs serving other Tribes *before* additional funds (including general appropriation increases) become available. Funding is not "reduced" when the Secretary is forced to spend less of an increase on a discretionary item than he had budgeted. Second, the reduction clause protects, not "tribal shares" or "administrative functions," but actual "programs serving [another] tribe" (or, as the Secretary puts it (US Br. 28), "direct program funding for delivery of services at local service units"). 59 Fed. Reg. 3166, 3168 (Jan. 20, 1994) ("programs" for tribes are "'generally performed at the reservation level'"). Stretching the Act's plain meaning to place off limits the $216 to $250 million the Secretary annually designated as Area and Headquarters "tribal shares" in support of his bureaucracy (JA 525, 542, 562) is utterly unsupported in the statutory text. In the Government's world, even if Congress had tripled IHS's budget each year the Secretary would still be authorized to pay these claimants nothing by the simple expedient of reclassifying all other funds as "tribal shares" or "residual."[9]

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[9] The Secretary points to evidence that by 1999 he did in fact reduce spending on the non-"inherent" part of the IHS bureaucracy (US Br. 36), as (1) "reductions [were made] due to cuts in administrative funding," S. Rep. No. 106-221, at 2 (1999), and (2) responsibilities for health facili-

The only relevant question is how much did the Secretary actually spend on ongoing programs serving other Tribes. The Secretary's failure to answer that question directly, notwithstanding his undenied burden, is understandable given that the record proof (even without discovery) showed large portions of administrative funds were never spent on programs serving Tribes (Tr. Br. 48). Avoiding these facts, the Secretary shifts to yet another new theory, trying to draw a direct connection between funding for "programs, projects, and *activities* serving a tribe" (the reduction clause) and funding for the Secretary's "administrative *activities*" (mentioned in § 450f(a)(1)). US Br. 28-29. But to do this requires omitting the key modifier "administrative," permitting the Secretary to blur the unmistakable line Congress drew between funding for activities actually "serving a tribe," and the Secretary's administrative functions whose funding cannot be a basis for reducing a contract, *see* § 450j-1(b)(1) (contract amounts "shall not be reduced to make funding available for . . . administration by the Secretary"). The Government's reading would cut the words "serving a tribe" right out of the reduction clause, and also nullify § 450j-1(b)(3)'s reference to "Federal [employee] pay costs." More fundamentally, it would permit the Secretary to reduce contract payments, not to save another Tribe's hospital, but to save the Secretary's administrative staff.

Ultimately, the Secretary's arguments about the reduction clause unravel the ISDA. It is precisely because the Secretary prior to 1988 successfully asserted unreviewable authority to underfund ISDA contracts that Congress rewrote the Act, not once but twice. Tr. Br. 4-10. The Government's position here confirms the wisdom of those reforms, for the Secretary

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ties were shifted to tribal contractors, *id.* But there is no evidence that in the earlier years at issue here more cuts could not have been made, or explanation why the Secretary failed in those years to apply a fraction of those freed-up monies to pay *any* of his contract obligations, instead of boosting spending on inherent federal functions by 41%.

has continued to prioritize everything else he does, including his residual and upper level bureaucracies, over his contractual duty to pay–even in years when Congress substantially boosted his appropriation, the Secretary boosted his own "residual," his own streamlining reforms freed up additional resources, and up to $98 million went unspent. While it is indisputably true that the pressures on IHS (as with other agencies) from insufficient funding are great, Congress prohibited the agency from using that fact as *carte blanche* to penalize the people served in contracted hospitals by underfunding the contracts and setting them up for failure–at least not when the Secretary cannot meet his undisputed burden to clearly demonstrate that fully paying them would compel a reduction in any ongoing program actually "serving a[nother] tribe."[10]

C. Section 314 Cannot Undo The Secretary's Breach.

Section 314 declares that the amounts recommended in the FY1994-FY1998 appropriations committee reports "are" now the total amounts available for CSC payments. The Federal Circuit held this rider cut off any additional payments from the unobligated balances still remaining from those five expired Appropriations Acts. The Government resists this plain meaning by arguing that it cannot be reconciled with later riders that borrow the same language. The Government then argues that the rider retroactively clarified the earlier Acts, switches to arguing it retroactively changed them, and finally

[10] The Government errs in arguing that the portion of the considerable annual leftover balances (Tr. Br. 12) associated with "collections"could not be used for CSCs (US Br. 37 n.14). *All* these collections could have been spent on hospital and clinic overhead costs (*i.e.*, CSCs), because payments for such costs are "for the facilities, and to carry out the programs . . . to provide health care services to Indians," 25 U.S.C. 1621f(a), and are "necessary [for such facilities] to achieve compliance" with applicable accreditation requirements, 42 U.S.C. 1395qq(c) (Medicare); 25 U.S.C. 1642(a) (Medicaid). Indeed, it is the failure to pay these very costs that nearly led to the loss of the Owyhee Hospital's accreditation, *supra* 4 n.3. But noticeably, even the Government is not categorical, asserting only that these unspent balances of up to $98 million "*may* include funds that could not be used for CSCs." US Br. 37 n.14 (emph. added).

argues that it retroactively authorized the Secretary's earlier unauthorized acts. None of these contentions is correct.

The Government appears to recognize that, on its face, § 314 could be read as an accounting measure targeted at the current expenditure of the unobligated balances remaining from the five earlier Appropriations Acts, given that the rider's five year look-back provision matches the five-year availability of the expired appropriations accounts. US Br. 47, citing 31 U.S.C. 1552(a). That is how the Federal Circuit read it. Pet. App. 29a. To counter this reading, the Government points to later versions of the rider that reach back more than five years, from which it concludes that the original rider must not have been focused on the unobligated balances after all. That is a stretch. First, the issue presented here is § 314, not the later riders (US Br. I). Second, the five-year rule for charging expired appropriations does *not* bar charging a current account for an obligation that is *older* than five years. 31 U.S.C. 1553(b)(1). Thus, the Government's only textual basis for rejecting the Federal Circuit's plain meaning interpretation collapses.[11]

The Government's contrary interpretation is self-contradictory. The Government argues that § 314 "changed existing law by clarifying the total amounts available for CSCs in the specified years" (US Br. 21). But a clarification is not a change, and the Government cannot have it both ways. If § 314 is a "change" to the prior Appropriations Acts, it means appropriations were available under prior law at the time of those Acts, the Tribes' contract rights vested, and the Tribes win. If § 314 is a "clarification" of what appropriations were

[11] The equally troubling issue the Government never confronts is why, if Congress in § 314 intended retroactively to clarify or amend the earlier Appropriations Acts, it was necessary each year to reenact it at all; on its face, the reenactment of the rider implies the rider was not permanent, but only a one-year measure directed at the remaining unobligated balances. It makes no sense to contend (as the Secretary must) that § 314 clarified or amended the earlier Appropriations Acts, but only for the year, after which the unamended laws would pop back up absent another rider.

"available" from the prior Appropriations Acts, then the Government is prescribing a rule of decision to the courts in adjudicating rights under past law. Either way, as retroactive legislation aimed at the Tribes' long-before vested contract rights, § 314 violates *Winstar* and *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

The Government wrongly invokes *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) to argue that § 314 retroactively "clarified" that additional funds from the earlier appropriations were never legally available. Nothing in the text indicates an attempt at retroactive clarification; § 314 does not speak in the past tense; and § 314 does not meet the other criteria for a "clarification." Tr. Br. 38-40; *INS v. St. Cyr*, 533 U.S. 289, 315-17 (2001) (noting heavy presumption against retroactivity). Even if it did, *Red Lion* would be inapposite. *Red Lion* deals with situations where Congress adds new prospective legislation that is premised on an agency's prior construction of a statute, where the subsequent legislation ratifies the consistency of that construction with the existing statute, 395 U.S. at 380-83; it does not grant Congress license to define the meaning of past law into what it otherwise would not be in order to dictate the outcome of pending litigation over contracts to which the Government is a party. Moreover, even if Congress did attempt a mere clarification of existing law, this Court would not be bound, for "a later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996).

In the end, even the Government does not believe that if § 314 is retroactive, it merely "clarified" pre-existing law and "ratified" the Secretary's earlier understanding. The Government concedes that under the law as it existed in 1994 the Secretary was not "*prohibited*" from paying CSCs in full (US Br. 45), yet asserts that after § 314 the Secretary became retroactively "prohibited" from paying them. How a shift from a permissive measure to a mandatory measure does not work a *change* in law is never explained. A statute cannot at one

time ratify an agency's interpretation of a law and make that interpretation no longer the law.

Eventually the Government is left to argue that § 314 retroactively amended and "'changed'" pre-existing law (US Br. 48). If that is what Congress purported to do, it crossed the lines this Court drew in *Winstar* and *Klein*. Tr. Br. 40-41. Under the former, Congress simply lacks any "sovereign power" to alter the rights of those with whom the Government contracts. *Winstar*, 518 U.S. at 879 n.22 ("The Government could not, for example, abrogate one of its contracts by a statute abrogating the legal enforceability of that contract, Government contracts of a class including that one, or simply all Government contracts"). Although Congress can legislate retroactively, in doing so it cannot "destroy vested rights," *Kaiser Alum. & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 856 (1990) (Scalia, J. concurring). Inexplicably, the Government never responds to this fundamental difficulty with its position. If a contract subject only to the availability of appropriations confers no vested rights when appropriations become available, over a century of government contract law has been turned on its head. Tr. Br. 25-30; CoC Br. 5-12. But if that is *not* correct, and contract rights did vest, then § 314, as construed by the Government, is invalid. This Court in *Winstar* declined to protect the Government in circumstances involving a much closer call; there is no reason for a different outcome here.[12]

Equally troubling is that if § 314 is construed as a targeted congressional response to successful ongoing litigation to vindicate private rights against the Government for money damages, then the rider amounts to an instruction to the

[12] In *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41 (1986), the Social Security Act did not create contract rights, and the Government reserved in the agreement the power to amend prospectively both the agreement and the SSA provisions it implemented. Even so, in discussing contracts this Court cautioned that "sovereign power" does not include "the power [of Congress] to repudiate its own debts . . . simply in order to save money." *Id.* 55.

courts to alter their rulings and construe the earlier Appropriations Acts in the Government's favor. That is precisely the kind of action Congress cannot take when the issue involves private contract rights, precisely as was the case in *Klein* (involving congressional interference in a private right of action arising from a Presidential pardon). *See The Clinton Bridge*, 77 U.S. (10 Wall.) 454, 463 (1870) (noting Congress could not pass a law requiring a rule of decision be applied to a pending case involving a "private right of action"); *Biodiversity Assoc. v. Cables*, 357 F.3d 1152, 1170-71 (10th Cir. 2004) (contrasting *Klein*'s application to "private rights" and a "private right of action" for "money damages" with cases involving injunctions and "public rights"). The Government errs in relying on *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429 (1992), for *Robertson* involved a statutory amendment that removed the basis for an injunction to enforce prospectively a public right granted under the statute. It did not involve private rights to money damages against the Government under expired laws that have no current life, nor a rider targeted narrowly at those damage claims only. Fortunately, the Federal Circuit's reading of § 314 avoids the need to consider any potential constitutional tension under *Klein*.[13]

CONCLUSION

For the foregoing reasons, the judgment of the Federal Circuit in No. 03-853 should be affirmed and the judgment of the Tenth Circuit in No. 02-1472 should be reversed.

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[13] This Court's tariffs jurisprudence has nothing to do with this case (US Br. 48-49). It is one thing for Congress to ratify an agency's authority to impose tariffs, and quite another to alter the meaning of expired Appropriations Acts and 'ratify' the Government's own breach of contract. "[A] distinction must be taken 'between a bare attempt of the Legislature retroactively to create liabilities for transactions . . . fully consummated in the past . . . and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice'" and "impairs no substantial right"). *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297, 302 (1937).

Respectfully submitted,

CARTER G. PHILLIPS
STEPHEN B. KINNAIRD
HOWARD J. STANISLAWSKI
SIDLEY, AUSTIN, BROWN & WOOD, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

* Counsel of Record

LLOYD B. MILLER *
ARTHUR LAZARUS, JR., PC
HARRY R. SACHSE
WILLIAM R. PERRY
MELANIE B. OSBORNE
AARON M. SCHUTT
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street, N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240

Counsel for Cherokee Nation and Shoshone-Paiute Tribes

APPENDIX A

SAMPLING OF STATUTES CONDITIONING AGENCY DUTY TO PAY ON THE "AVAILABILITY OF APPROPRIATIONS"

1. 15 U.S.C. § 636(m)(7)(B)(i) ("Subject to the availability of appropriations, of the total amount of new loan funds made available for award under this subsection in each fiscal year, the Administration shall make available for award in each State (including the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, and American Samoa) an amount equal to the sum of (I) the lesser of—(aa) $800,000; or (bb) 1/55 of the total amount of new loan funds made available for award under this subsection for that fiscal year; and (II) any additional amount, as determined by the Administration.")

2. 16 U.S.C. § 5608(b) ("The Secretary of State shall, subject to the availability of appropriations, pay all necessary travel and other expenses of persons described in subsection (a)(1) of this section and of not more than six experts and advisers authorized under section 5601(e) of this title with respect to their actual performance of their official duties pursuant to this chapter, in accordance with the Federal Travel Regulations and sections 5701, 5702, 5704 through 5708, and 5731 of Title 5.")

3. 20 U.S.C. § 4357(b)(2) ("Subject to the availability of appropriations, the Secretary shall make payments to each Federal endowment fund in amounts equal to sums contributed to the fund from non-Federal sources during the fiscal year in which the appropriations are made available (excluding transfers from other endowment funds of the institution involved).")

4. 25 U.S.C. § 640d-27(a) ("In any litigation or court action between or among the Hopi Tribe, the Navajo Tribe and the United States or any of its officials, departments, agen-

cies, or instrumentalities, arising out of the interpretation or implementation of this subchapter, as amended, the Secretary shall pay, subject to the availability of appropriations, attorney's fees, costs and expenses as determined by the Secretary to be reasonable.")

5. 29 U.S.C. § 1907(b)(2) ("Subject to the availability of appropriations, the Secretary shall make payments to the Endowment Fund in amounts equal to sums contributed to the Endowment Fund from non-Federal sources (excluding transfers from other endowment funds of the Center).")

6. 29 U.S.C. § 3012(b)(3)(B) ("Subject to the availability of appropriations to carry out this section, the allotment to any system under subparagraph (A) shall be not less than $50,000, and the allotment to any system under this paragraph for any fiscal year that is less than $50,000 shall be increased to $50,000.")

7. 42 U.S.C. § 13921(a)(3) ("The Attorney General shall make available not less than $800,000 per project, subject to the availability of appropriations, and such funds shall be allocated—(A) 50 percent to the affected State and local law enforcement and prevention organizations participating in such projects; and (B) 50 percent to the Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice for salaries, expenses, and associated administrative costs for operating and overseeing such projects.")

8. 46 U.S.C. § 53106(a)(1) ("The Secretary, subject to the availability of appropriations and the other provisions of this section, shall pay to the contractor for an operating agreement, for each vessel that is covered by the operating agreement, an amount equal to—(A) $2,600,000 for each of fiscal years 2006, 2007, and 2008; (B) $2,900,000, for each of fiscal years 2009, 2010, and 2011; and (C) $3,100,000 for each fiscal years 2012, 2013, 2014, and 2015.")